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IN THE

Supreme Court of the United States

OCTOBER TERM—1982

ARTHUR YOUNG & COMPANY,
Cross-Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF CROSS PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Rather than demonstrating why Arthur Young & Company's ("AY") Petition for a Writ of Certiorari should not be granted, the arguments advanced by the Solicitor demonstrate the need to grant certiorari. Essentially, the government advances three arguments:

1. The IRS cannot be expected to specify the subject matters of its inquiry since it does not know what it wants until it sees the documents.

2. AY's proposed subject matter inquiry would result in a burden on the judiciary by requiring countless *in camera* inspections.

3. There is no Fourth Amendment issue because the description of the workpapers is clear and production would not be unduly burdensome.

Each of the positions advanced by the Government is not supported by the record or law.

I.

THE IRS CAN, AND SHOULD BE REQUIRED TO, SPECIFY ITS AREAS OF INQUIRY

The fundamental premise underlying the position of the IRS throughout this proceeding is that it cannot specify the subject matters of its inquiries because it does not know what it wants.[1] This position is incorrect. At the time the IRS sought access to AY's work papers, the IRS had already issued 400 information requests to Amerada and had obtained over 40,000 documents. Thus, documents were sought from AY (in accordance with IRS policy) only after it had completed substantial portions of its investigation of Amerada and had clearly identified its areas of inquiry. (In fact, the record contains evidence that at the time of this enforcement proceeding, the IRS audit of Amerada was virtually complete.) Despite its argument that it could not designate with particularity for AY the subject matters of its inquiry, the IRS was able to do so for Amerada in the form of over 400 separate and specific Revenue Agents Requests (*see* AY Petition at 7).

Further, the fifth and last affidavit submitted by the IRS to the district court indicated that the IRS wanted AY's "engagement

1. In arguing that until it examines the contents of the documents, it cannot identify them with any specificity, the IRS confuses two concepts. AY does not contest the IRS claim that until it sees the contents of a particular document, it cannot specifically identify that document—*e.g.*, letter from Smith to Jones. (*See* AY Petition at 4, n. 6). But that is markedly different from identifying the subject matters as to which documents are sought and which the IRS clearly knows it is investigating so that the summoned party may cull its own files and produce the requested material. Thus the fallacy of the IRS position lies in the fact that there is no need for it to know the identity of the specific documents since the summoned party is obligated to find and produce those documents which are relevant to the subject matters under inquiry.

Thus, identification of specific documents is not what is at issue here. At issue is whether the IRS must define for the court and the party whose documents are summoned the subject matter as to which documents are sought so that the relevancy of the demand can be tested. This has not been done here; and absent such subject matter definition, the summons becomes a general warrant and license to conduct a fishing expedition.

planning questionnaire" so that when "read in conjunction with [AY's] engagement letter" it "would indicate the scope of the audit [and o]bviously, if the audit was not involved with areas which are the subject of the investigation it would be unnecessary to examine the records further." Clearly, then, the IRS knew the subject matter of its inquiries and should have delineated them so that the district court could test the claim of relevancy for the documents which the IRS sought. The IRS never did this, but instead relied on its bald statement that it needed every piece of paper in AY's files relating to Amerada.

Thus the Government's claim (Memorandum in Opposition at 6 "Memorandum") that it does not and could not know what it wants is factually wrong and contradicted by its own affidavits below.

II.

REQUIRING SUBJECT MATTER DESIGNATION DOES NOT RESULT IN AN *IN CAMERA* INSPECTION

The Government further asserts that requiring it to set out its document demands in terms of the subject matters it seeks would result in repeated judicial *in camera* inspections. Other than the *ipse dixit* of the Government (Memorandum at 4, n. 4), there is no support for this bald proposition; but more importantly, a critical examination of the proposition does not support the conclusion advanced. For example, under AY's formulation, the party seeking the documents (here the IRS) would subpoena all documents relating to "inventory" (as opposed to all documents relating to Amerada, as the IRS did here). From this one of two events would flow:

1. AY would produce all inventory workpapers, or

2. AY would contest the demand on the grounds that inventory is not a subject of the investigation and therefore the demand is irrelevant.

Under formulation one, the inquiry ceases because all documents relevant to inventory would be produced.[2] Under formulation two the Court can test the demand against the purpose of the investigation without the need for an *in camera* inspection of any AY papers.[3] In so doing, the courts perform the judicial oversight function delegated to them by Congress.

Even assuming arguendo the Government's position that AY's approach requires an *in camera* inspection, the logical conclusion of the Government's position is that the Congressionally delegated oversight function is to be ignored if it causes a burden on the judiciary. We do not believe that such a policy should be countenanced either in the name of an unsupported claim of judicial burden or where its acceptance effectively results in the elimination of any judicial oversight against unwarranted intrusions by the government into the private sector.

III.

THE FOURTH AMENDMENT IS APPLICABLE AND DICTATES DENIAL OF THE IRS REQUEST

The Government's next contention is that the Fourth Amendment has no applicability because "there is no claim that the demand was unclear or overly burdensome." (Memorandum at 3, n. 3.) This is factually inaccurate. Below, AY argued that the request was overly burdensome. We submit that the district court's attempt to protect AY did not meet the concerns raised by AY.

More importantly, the Government's narrow construction of the Fourth Amendment is legally incorrect. It argues that because the IRS asked for *every* piece of paper in AY's files relating to Amerada, the summons was not unclear. Logically, this too must fail. Applying this rationale, the Government's argument means that if it asked for every piece of paper in the files of a company such as General Motors, even though it would

2. This is what occurs in many of the more than 200 subpoenae which AY annually receives for its workpapers.

3. *In camera* inspections might only be needed if a claim of privilege were advanced—something not at issue on this Petition.

require productions of *billions* of pages of documents, the summons would not be unclear and therefore no Fourth Amendment problem exists. The Government's position is effectively, then, that a general warrant power exists. We submit this is not, nor as a matter of policy should it be, the law.

> Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power . . . . But it is sufficient if the inquiry is within the authority of the agency, *the demand is not too indefinite and the information sought is reasonably relevant.* (Emphasis added.)

United States v. Morton Salt Co., 338 U.S. 632 652 (1950).

Here, the IRS never established that the information sought was reasonably relevant. In fact, its use of a request which defined the material sought by the generic characteristic of the document (*e.g.*, letter, memo) is *ipso facto* "unclear," indefinite, overly broad, and a *per se* violation of the Fourth Amendement.

CONCLUSION

The Government has never made a showing that all of the material sought from AY was "reasonably relevant." In fact, the uncontroverted record demonstrates that much of what was sought could not be relevant under any definition of relevancy (AY Petition at 8, n. 12)—a point as to which the Government's Memorandum is conspicuously silent. To allow enforcement of the IRS summons on the unsupported claims of relevancy results in a total abdication of the judicial oversight function in summons enforcement proceedings. Accordingly, it is respectfully requested that this Petition for Writ of Certiorari be granted to define the proper level of judicial review and the applicable standard for determining relevancy in summons enforcement proceedings.

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